
UNITED STATES OF AMERICA

v.

DAVID M. HICKS

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) **Defense Objection to the Presiding
Officer or his Assistant
Instructing Providing Advice to
the Commission on the Law**
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) 7 September 2004
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The Defense in the case of the *United States v. David M. Hicks* objects to the preliminary instructions to the Commission as set forth in the Trial Guide for Military Commissions (draft of 22 August 2004) (Trial Guide), to Sections 4A and 5 of MCI No. 8, and to provisions concerning the role and activities of the Assistant to the Presiding Officers as set forth in POM #2 para. 1c, POM #2-1 para. 1c, the Appointing Authority's memorandum to the Presiding Officer dated 19 August 2004 (Appointing Authority's memo), and Presiding Officer's interlocutory question #4, as follows:

Introduction:

1. Page 10 of the Trial Guide the Presiding Officer (PO) provides "information" on the "procedures the Commission will be using in deciding" cases to the Commission. The third paragraph of this "information" states, "[a]s I am the only lawyer appointed to the Commission, I will instruct and advise you on the law."
2. The Defense objects to this "information" being given to the Commission members because it is not authorized by the President's Military Order of November 13, 2001 (PMO), Military Commission Order No. 1 (MCO #1), or Military Commission Instruction No. 8 (MCI #8).
3. Further, to the extent that Sections 4A and 5 of MCI No. 8, as well as, the questions posed in interlocutory question #4 are inconsistent with the PMO making the Commission as a whole the finder of fact and law, the defense objects to the PO adjudicating or ruling any substantive motions and questions that arise during the course of Mr. Hicks' trial.
4. In addition, there is no authority for the Assistant to the Presiding Officers to "provide advice to either the Presiding Officer [or the Commission] in the performance of the Presiding Officer's adjudicative functions" as stated in the Appointing Authority's memo and POM #2 because, as will be shown below, the Presiding Officer has limited power to rule on controverted matters, and any "advice," evidence, or information on the applicable law provided to the Commission must come from the parties.

Discussion:

5. There is no provision in either the PMO or MCO #1 which would allow the PO to "instruct and advise" the Commission on the law. The PMO makes the Commission as a whole the "finders of fact and law" for the Commission.

6. The PMO does not give the PO the powers of a military judge. “The PMO identifies only one instance in which the Presiding Officer may act on an issue of fact on his own. Then, it is only with the members present that he may so act and the members may overrule the presiding Officer’s opinion by a majority of the commission.”¹ By stating that the Commission as a whole is the sole finder of fact and law, the PMO specifically rejects the notion that the PO is a judge. The PO is authorized to make preliminary rulings on admissibility of evidence, which may be overturned by the Commission, and to make decisions regarding administrative matters such as scheduling and closing sessions. Beyond those functions, the PO has no independent authority. Any substantive matters, which the defense submits includes any matter over which there is a controversy between the parties, must be decided by the Commission as a whole as the sole finders of fact and law.

6. Allowing the PO to advise the other Commission members on the law, and to rule on substantive motions and objections, places the PO in a de facto position of authority over the other Commission members, giving him undue influence over the Commission.

7. The PO should have no more voice or influence in the Commission than any other member. If the PO is authorized to “instruct and advise” the Commission on the law, or to rule on controverted matters, he would, by definition, have more influence on the deliberations of the Commission than is authorized by the PMO. Granting one member more influence over the Commission than other members are afforded would skew the Commission’s deliberations and make it impossible for the Commission to provide a “full and fair” trial.

8. Moreover, any “advice” on the law provided to the Commission should come from the parties through the operation of the adversarial system. Because the Commission is the “finder of fact and law,” the parties should have the ability to present evidence of what the law is to the Commission so that they may make findings as to what law applies to Mr. Hicks case. Indeed, that is the system under which the Commission members were explicitly questioned during *voir dire*, as endorsed by the PO. Altering that construction at this stage would sow considerable confusion (in addition to being directly contrary to the PMO).

9. Because the PO is not a judge, and has no greater voice in the proceedings than any other member of the Commission, he should not be entitled to obtain advice on “his adjudicative functions” from the Assistant to the Presiding Officers. First, as stated above, the Presiding Officer’s only adjudicative function is making initial rulings on admissibility of evidence. As a former military judge of over 10 years experience, COL Brownback will need no assistance in determining, at least preliminarily, what evidence is admissible. Second, all input on the applicable law should be coming from the parties. Allowing one member of the Commission to have what amounts to a law clerk will place that member in a de facto position of authority over the rest of the panel. Further, it raises the specter of materials not in the record being introduced into the deliberations of the Commission. Should any of these situations occur, the Commission would not be able to provide a “full and fair” trial for Mr. Hicks.

¹ See Memorandum: Legal Advisor to the Appointing Authority of August 11, 2004.

10. Moreover, if the PO or the Assistant to the Presiding Officer is authorized to instruct or advise a member of the Commission or the Commission as a whole on the law, it may lead to the parties being precluded from presenting relevant and probative evidence on the applicable law, or arguing their position on the law to the Commission.

11. This would inhibit the Commission in carrying out its duty as the sole finder of fact and law. Such a result is inconsistent with the PMO and would make it impossible for Mr. Hicks to have a full and fair trial.

12. Any evidence, briefs, or arguments on the state of the law applicable in this case should be provided by the parties as part of their cases or in response to requests from the Commission. Such evidence, briefs, or position should be heard by the Commission as part of its proceedings. Any rulings on controverted matters that arise during the trial process should be decided by the Commission as a whole, and should be based solely on the evidence and arguments of the parties, not on advice or instructions from the PO or the Assistant to the PO.

13. The PO's IQ #4 says it "may appear to some to be unclear" – it is obviously unclear to the PO, who raises doubts as to the clarity of the system itself (since uncertainty was the hallmark of the preliminary proceedings conducted August 23-26, 2004, at the U.S. Naval Station, Guantanamo Bay, Cuba). In Para 3 of IQ #4, the PO glaringly fails to offer the obvious third alternative– in fact, the solution compelled by the PMO and MCO No. 1: that the PO may not provide advice or instruction to other commission members.

14. Para 5(a) of IQ#4 attempts to make an analogy to the UCMJ: "as would a military judge in a courts-martial" However, this illuminates the problem of creating a system without any analog to a legitimate pre-existing legal system. Components of those systems cannot be incorporated piecemeal to fit the result desired by the PO (or the Appointing Authority). The Commission is stuck with the fatally deficient system that has been enacted. Continuing to change it in fundamental ways in mid-stream merely demonstrates that the system suffers from the twin vices of vagueness: it fails to provide adequate notice, and it is too susceptible to arbitrary and discriminatory application. Indeed, counsel cannot predict which provisions of which systems the PO or Appointing Authority will engraft on to the Commission process, or when such integration will occur (or whether the incorporation will be in whole, or in part, or which part). The possibilities completely defeat the purpose of the notice aspect of due process and fundamental fairness. Accordingly, it cannot be countenanced.

15. Para 5(b)(1) of IQ#4 seeks the option of providing instructions not in open court outside the presence of the parties, including the accused. This option will remove all transparency to the proceeding.

16. The option put forth in Para 5(b)(2) is completely contrary to the system under which we conducted *voir dire* – that ultimately the decision was for the commission as a whole, and each individual member had to resolve disputed questions of law. The PO acknowledged that on the record, and now is seeking to amend the fundamental authority of the PO as limited under the MCO's and MCI's. That dramatically alters the fundamental character of the commission(s), and directly contravenes the structure directed by the PMO. The same is true for the revisions

proposed in ¶¶ 5(B)(3), 5(B)(4), 5(B)(5), 5(B)(6) & 5(B)(7). The persistent effort to recast the structure of the Commission would make a mockery of MCO No. 1 with respect to the Commission's role, as a unit and as per the PMO and MCO No. 1, as the arbiter of all issues of fact and law. If the PO's proposals are approved, the Commission system will be even more bereft of discernible, predictable rules and standards than it is already.

Conclusion:

13. The Defense requests:

(a) the Trial Guide be amended to strike any reference to the PO or any other person acting as a legal advisor to the Commission or providing legal advice to the Commission or the PO;

(b) the provisions of Sections 4A and 5 of MCI No. 8 be amended to comport with the PMO regarding the limited authority of the PO;

(c) the PO retract his prior statements to the Commission regarding his power to "instruct and advise" the Commission on the law, and inform the Commission members that the Commission as a whole will hear and decide all controverted matters raised at during Mr. Hicks' trial except those certified to the Appointing Authority pursuant to MCO No. 1 section 4A(5)(d);

(d) the Appointing Authority issue guidance to the PO regarding the duties and role of the Assistant to the PO consistent with this objection; and

(e) that the Appointing Authority respond to interlocutory questions #4 by informing the PO that he does not instruct on law or attempt to influence other commission members on areas of the law. That all issues of law should be presented by the parties in an open session of the commission and decided by the commission as a whole.

By: _____

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